2013 IL App (1st) 130973-U

FOURTH DIVISION
December 12, 2013

No. 1-13-0973

IN THE APPELLATE
COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SUJITH SUNDARARAJ and JOYCE SUNDARARAJ,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellees,	)	Cook County.
	)	
v.	)	No. 09 L 3831
	)	
YAROSLAV KOT,	)	The Honorable
	)	Raymond W. Mitchell,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Howse and Justice Lavin concurred in the judgment.

ORDER

HELD: Trial court properly found existence of agency relationship between defendant and project manager of construction project such that notice by plaintiffs of water infiltration problem within one-year warranty period of construction contract to project manager acted as notice to defendant, and trial court properly found that defendant was equitably estopped from requiring written notice of this problem pursuant to the construction contract.

¶ 1 Plaintiffs-appellees Sujith Sundararaj and Joyce Sundararaj (collectively, plaintiffs, or as

named) brought a breach of contract, breach of warranty, consumer fraud and negligent hiring suit against defendant-appellant Yaroslav Kot (defendant) with respect to a real estate purchase contract. The trial court issued an award for plaintiffs and against defendant in the amount of $75,383.67. Defendant appeals, contending that the trial court erred in entering its judgment in light of a one-year limited warranty that appeared in the contract. He asks that we reverse the trial court's order and either remand the matter or enter judgment in his favor. For their part, plaintiffs have chosen not to file a brief in this cause. Therefore, we consider the instant appeal on appellant's brief only, pursuant to *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976). For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 As noted, this cause revolves around a July 2005 real estate contract pursuant to which defendant agreed to build and sell plaintiffs a home to be located at 1516 West Erie in Chicago for the price of $930,000. As per the contract, defendant promised to complete the home "substantially in accord with the plans and specifications" as agreed to by the parties. The contract also contained a paragraph entitled "Warranty provisions," which stated:

> "EXCEPT AS EXPRESSLY PROVIDED HEREIN, [DEFENDANT] HEREBY EXCLUDES ANY AND ALL WARRANTIES, EXPRESS OR IMPLIED *** WITH RESPECT TO THE RESIDENCE. BY EXECUTION OF THIS AGREEMENT, [PLAINTIFFS] ACKNOWLEDGE[] THAT [PLAINTIFFS HAVE] READ AND UNDERSTAND[] THE LIMITED WARRANTY ATTACHED HERETO ***." (Emphasis in original.)

The Certificate of Limited Residential Warranty, attached to the contract, stated, in pertinent part:

> "[Defendant] warrants the single family residence *** against defects and/or latent defects arising out of faulty workmanship, material or defects in design for a period ("Warranty Period") of one (1) year from the Closing Date, ***. [Defendant's] obligation under this Limited Warranty shall be limited to repair or replacement, at his option, of the faulty workmanship or material. This certificate is applicable only if any defects are reported in writing to [defendant] before the end of the Warranty Period. Any defects reported in writing to [defendant] before the end of the Warranty Period shall be repaired or replaced by [defendant] regardless of whether or not the Warranty Period has elapsed. No steps taken by [defendant] to correct defects shall act to extend the Warranty Period."

In addition, the "Notices" paragraph of the contract stated that "[a]ll notices and demands shall be made in writing."

¶ 4 As he began work on the house, defendant hired Mikhail Martyniv as his "project manager." The house was completed and closed via plaintiffs' purchase on September 29, 2005, thereby beginning the one-year warranty period. In February 2006, plaintiffs noticed a large water stain on their dining room wall and called Martyniv, who came to the home, inspected the problem and told plaintiffs some extra sealing, painting and tuckpointing work needed to be done; Martyniv did the work and told plaintiffs the problem had been resolved. However, water continued to leak into the home and, by 2008, it was severe enough that it cost plaintiffs about

$90,000 to repair. When plaintiffs called defendant in the summer of 2008, he refused to discuss the situation. Accordingly, plaintiffs brought suit against defendant for breach of contract, breach of warranty, consumer fraud and negligent hiring and supervision.

¶ 5 At trial, plaintiff Sujith testified that, while he purchased the home from defendant, he mainly, and regularly, spoke to Martyniv both before and after plaintiffs moved into it. Martyniv introduced himself to Sujith as the general contractor of the project and whenever Sujith would go to the project site, Martyniv was always present. Martyniv gave Sujith his cell phone number and told him to call him if there were any problems. Plaintiffs discussed several details with Martyniv regarding the building of the home, including when it was to be completed, the type of flooring, paint and finishes to be used, etcetera. Whenever plaintiffs had a question about the project, they called Martyniv. At the time of the closing, plaintiffs did not note any problems with the home. Afterwards, there were a few items that needed to be completed as part of a punch list; plaintiffs and Martyniv were in routine contact with respect to these.

¶ 6 Sujith averred that in February 2006, he and his wife noticed a water stain in the ceiling and corner walls of the dining room that would vary in size from an inch to almost a foot. Sujith called Martyniv at the phone number he always had and asked him to come and examine the problem. Martyniv came to the home, said it was a water stain and told Sujith that, upon his examination, he needed to do some repairs, including repainting to cover the discoloration on the inside walls and ceiling, placing sealant on the outside of the home, and performing some tuckpointing on the roof once the weather improved. Sujith averred that over the next few days, Martyniv came to the home with workers; they painted the inside and also performed some work

outside, which Sujith assumed was the sealing process Martyniv explained to him. Then, when the weather improved, Martyniv and the workers set up scaffolding and went around the entire outside of the home doing the tuckpointing work. Martyniv was present the entire time the work was being done, either assisting the workers or overseeing the work. This work last a few weeks. Sujith stated that, after the work was done, he asked Martyniv if the water problem was resolved; Martyniv told him that it was, that the house was now watertight and that plaintiffs should not have any more problems. Having consistently believed that Martyniv operated under defendant's authority, and relying on Martyniv's assurances, Sujith sought no further assessment of the water problem at that time.

¶ 7 Sujith further testified that, in 2008, plaintiffs attempted to sell the house. However, several people mentioned that it had a musty smell. Plaintiffs contacted a mold inspection service, which took specimens from the home that tested positive for mold. By the fall of 2008, plaintiffs had contracted a mold remediation company, which had to remove all the drywall in the master bedroom and portions of the drywall in the office. Following an inspection by a licensed building inspector, it was discovered that structural work needed to be done to the home to prevent the problem from recurring. Ultimately, between the mold inspection, mold remediation and structural work, plaintiffs spent between $80,000 and $90,000 to repair the home. Sujith contacted Martyniv during this time; Martyniv came to the home and saw the damage and the work being done. Sujith stated that he contacted defendant by the end of the summer of 2008 to tell him about the mold problem and the repairs. Sujith explained the situation to defendant and told defendant that he would be willing to split the cost of the repairs if defendant would help.

Defendant was not responsive to that and told Sujith it was not his responsibility.

¶ 8 Martyniv, who admitted he is not licensed in any home building trade, testified that he was the project manager on the West Erie house and that defendant was the general contractor. He discussed his responsibilities with defendant prior to the start of the project, and these were to include seeking out subcontractors, providing blueprints, obtaining estimates, putting together a timetable for the project, maintaining safety at the site and dealing with inspectors; the subcontractors were responsible for the integrity of their work. Once plaintiffs bought the house, and before the construction was finished, Martyniv met Sujith, who came to the site often, and gave him his cell phone number; he would return Sujith's calls regarding the project and continued to communicate with him after the closing regarding several punch items that needed to be completed. Martyniv averred that Sujith called him about the water stain in the dining room on February 21, 2006. Martyniv was then asked about a series of telephone calls that occurred within the days after Sujith called him about the water stain. Telephone records showed that on February 22, 2006, Martyniv called defendant twice as well as the masonry contractor who had worked on the home; on February 23, 2006, Martyniv called defendant three times and then plaintiff twice; on February 24, 2006, Martyniv called defendant four times; on February 25, 2006, Martyniv called the masonry contractor and defendant; on February 27, Martyniv called plaintiff; and on February 28, 2006, Martyniv called the masonry contractor again. Martyniv placed several more calls to defendant and the masonry contractor in early March 2006, as well. In response to questions about the content of these telephone calls, Martyniv testified he could not remember. He admitted that he went to plaintiffs' house with respect to the water issue

several times, but claimed he did so not as part of his job but only as a favor based on his and Sujith's good relationship, though he never explained this to Sujith. He sent a painter to the house, as well as an assistant, but he did not know what they did with respect to the exterior; he later admitted that sealant was applied. He stated that he did not tell defendant about the painting or the sealing work, but did testify that he continually spoke to defendant, as they worked on subsequent projects together. Martyniv returned to plaintiffs' house in 2008 amid complaints regarding water infiltration; he could not remember if plaintiffs called him or if plaintiffs had called defendant who then called him. While he did not see any dark or black spots, he did note that much of the drywall had been removed and that the cement blocks inside the walls had changed color.

¶ 9 Defendant testified that he became a real estate developer in 2000; he does not have a license from this country in that area, nor is he a licensed architect, general contractor or subcontractor. He met Martyniv through friends and worked with him on a prior building project where Martyniv was the project manager. He did not know whether Martyniv was certified or licensed in any of the subcontracting trades. After obtaining financing to build the house on West Erie, the first person he hired was Martyniv; he and Martyniv then hired the subcontractors together. Defendant averred that Martyniv, as the project manager, was to supervise the subcontractors, coordinate their work and materials, and examine the consistency of their work. While each subcontractor was responsible for his own work, if Martyniv, as the project manager, were to find something wrong, he was to tell the pertinent subcontractor to fix it. Defendant also described that, as the general contractor, his responsibility was the same as the project manager's,

but it was the project manager who was supposed to be at the construction site all the time.

¶ 10 Regarding the project on West Erie, defendant stated that he visited there on average a couple times per month. He made sure everything was proceeding according to schedule, while Martyniv was the one checking daily to make sure the work was being done according to the plans and specifications. During construction, it was Martyniv that was in contact with plaintiffs, and defendant never told plaintiffs not to contact or consult with Martyniv regarding the construction of the house. In fact, defendant admitted that he never spoke to plaintiffs during construction. As plaintiffs purchased the house before the project was fully completed, defendant was aware that they discussed several items with Martyniv, such as finishes and flooring. Defendant averred that Martyniv, as the project manager, was constructing the home with all the authority that came along with that position.

¶ 11 Defendant further testified that he did not become aware of the water infiltration problem in plaintiffs' home until 2008, when he had a conversation with Martyniv while they were working on another project and when he received a letter from plaintiffs' attorney. Defendant went to plaintiffs' home at that time and saw the water and mold. Defendant stated that he knew Martyniv and Sujith were in contact with each other in January and February 2006, since Martyniv was in charge of completing all the remaining punch list items on the house, and that the two had developed a good relationship. Defendant averred that Martyniv did not tell him that Sujith had contacted him within a year following the closing, nor that he (Martyniv) had gone to the house to repaint and perform tuckpointing work. When confronted, as Martyniv was, with the same series of telephone calls from February and March 2006 among Sujith, Martyniv, the

masonry contractor and himself, defendant stated it was possible that these calls took place but he could not remember the content of them. Defendant claimed that, generally, if there are any big problems on a project after the time of closing, such as water infiltration, Martyniv is supposed to contact him and should do so within the one-year warranty term if he has notice of such problems. With respect to plaintiffs' house, defendant agreed that Martyniv's action of contacting the masonry subcontractor on the project was appropriate if plaintiffs reported a water infiltration problem to him, as the project manager. Defendant also stated that it would have been Martyniv's job to coordinate any postclosing items with the subcontractors, if there were any problems. Yet, defendant then testified that only he had the authority to make repairs after the closing that had not been included in the punch list, and that Martyniv would have had to get his permission to do such work. However, defendant could not remember whether repairing water problems was included in the punch list.

¶ 12 Finally, defendant testified that, if plaintiffs had a water infiltration problem, they should have contacted him, since Martyniv was not an expert in construction or in warranties. He also explained that, if plaintiffs had contacted him during the one-year warranty period, he would have brought subcontractors to the home to find the cause of the problem and then developed a plan to fix it. And, defendant admitted that Martyniv worked for him on the project and that he relied on Martyniv's experience in construction in relation to the project.

¶ 13 Several other witnesses testified, including the real estate agent who sold plaintiffs the home, the mason hired by defendant to work on the project, multiple building inspectors and those who removed the mold and performed the restorative work on plaintiffs' home. Following

the close of trial, the court issued an order in favor of plaintiffs with respect to their alternative theories of breach of contract and breach of warranty. Specifically, it held that plaintiffs had proved these counts based on "significant evidence" that defendant failed to construct the home according to the plans and specifications, and that defendant "undertook to repair the construction defects within the one-year warranty period" but that these repairs were inadequate. In response to defendant's affirmative defense of lack of written notice, the court held that defendant had received "actual notice to its agent, Martyniv, who undertook [ ] the repairs required under the warranty" and that, therefore, defendant had "effectively waived the requirement of written notice." The court awarded plaintiffs damages in the amount of $75,383.67.[1]

¶ 14 Thereafter, defendant filed a posttrial motion seeking to vacate the trial court's order, noting that, in response to his affirmative defense asserting the written notice provision of the real estate contract, plaintiffs had not pled waiver as the trial court had found but, rather, estoppel. Acknowledging this, the trial court issued a new order. In it, after discussing the doctrine of equitable estoppel, the court determined that there was sufficient proof adduced at trial to support a finding that defendant, by his actions, was estopped from requiring written notice. As evidence of this, the court noted that Martyniv, as defendant's "agent," received actual notice of the defects and undertook the repairs without requiring written notice; that plaintiffs in good faith justifiably relied "on [d]efendant's actions that the repairs would be

[1]The court found that plaintiffs could not prove their consumer fraud or negligent hiring claims.

completed without written notice;" and that plaintiffs "would suffer significant prejudice if [d]efendant was able to undertake the repairs, let the one-year warranty period lapse and then subsequently invoke the written notice requirement." Accordingly, the trial court denied defendant's posttrial motion, but amended its prior order by replacing its waiver findings with its equitable estoppel findings, thereby concluding that defendant, by his actions, was estopped from requiring written notice.

¶ 15 ANALYSIS

¶ 16 Defendant's sole contention on appeal is that the trial court erred when it entered judgment for plaintiffs notwithstanding the one-year warranty for construction defects found in the contract at issue. Asserting that plaintiffs never gave him notice within the one-year period nor any sort of written notice of the water problem, and claiming that the trial court's findings that Martyniv was his agent and that he (defendant) waived any notice requirement were not supported by the record, defendant insists that the contract's provisions regarding the warranty must control here and that, consequently, he is absolved from any liability. We disagree.

¶ 17 As a threshold matter, we wish to discuss the applicable standard of review. Initially, and citing, among other cases, *Kalata v. Anheuser-Busch Cos.*, 144 Ill. 2d 425, 433 (1991), defendant properly states that, where a trial court's factual findings in a bench trial, as was conducted here, are based on an assessment of the credibility of the witnesses and the weight to be given their testimony, a reviewing court is to defer to the trial court's decision unless it is against the manifest weight of the evidence. He also correctly notes that a decision is against the manifest weight of the evidence only when the opposite conclusion is clearly apparent or when the trial

court's findings are unreasonable, arbitrary or not based on the evidence. See *Bazydlo v. Volant*, 164 Ill. 2d 207, 215 (1995). However, he then states that, where the evidence before a trial court consists solely of depositions, transcripts, or is documentary in nature, a reviewing court is not bound by its factual determinations and is not to defer to its findings. See, *e.g.*, *In re Estate of Hook*, 207 Ill. App. 3d 1015, 1028 (1991).

¶ 18 In the instant cause, the record is clear that, contrary to defendant's allusions, the evidence before the trial court did not consist "solely of depositions, transcripts, or [was] documentary in nature." Rather, while depositions and such evidence may have been referred to and presented by the parties, as with discovery in any case, this bench trial rested on the testimony of those witnesses who testified–principally, plaintiff Sujith, project manager Martyniv, and defendant. Accordingly, it was an assessment of their credibility that was paramount to the outcome of this trial. Again, it is for a trial court to resolve all conflicts in evidence and to determine the credibility of the witnesses who present this evidence. See *Cotter v. Parrish*, 166 Ill. App. 3d 836, 842 (1988) (involving, as here, dispute between builder-vendor and purchasers regarding integrity of home). And, as long as there is any evidence in the record to support the trial court's ultimate findings, we, as the reviewing court, will not disturb them. See *Cotter*, 166 Ill. App. 3d at 842.

¶ 19 Based on the record before us, we find no reason to overturn the trial court's judgment in the instant cause.

¶ 20 As the trial court noted here, to prevail on a claim for breach of contract, a plaintiff must prove the existence of a valid and enforceable contract, performance by the plaintiff, the

defendant's breach of the contract, and that the defendant's breach resulted in damages. See, *e.g.*, *Unterschuetz v. City of Chicago*, 346 Ill. App. 3d 65, 69 (2004); see *Van Der Molen v. Washington Mutual Finance, Inc.*, 359 Ill. App. 3d 813, 822 (2005). And, to prevail on a claim for breach of warranty, a plaintiff must prove that the defendant made a definite and positive assertion of a material fact for the purpose of inducing the plaintiff to rely on it, the alleged warranty was such that a reasonably prudent person would rely on it, and the plaintiff did rely on it. See, *e.g.*, *Michuda v. Sanitary District of Chicago*, 305 Ill. App. 314, 349-50 (1940).

¶ 21 Defendant raises two critical concepts that are the central issues of this appeal: agency and waiver/estoppel. First, defendant attacks the trial court's finding that Martyniv was his agent and, as such, that plaintiffs' notice to Martyniv regarding the water infiltration problem and Martyniv's actions of attempting to fix it and telling plaintiffs that the problem was resolved are attributable to him (defendant). Agency "may be established and its nature and extent shown by circumstantial evidence, and reference may be had to the situation of parties and property, acts of parties, and other circumstances germane to the question." *Elmore v. Blume*, 31 Ill. App. 3d 643, 647 (1975) (discussing agency as between husband and wife who were also builders-vendors of newly constructed home); accord *Strino v. Premiere Healthcare Associates, P.C.*, 365 Ill. App. 3d 895, 902 (2006). A *prima facie* case of agency can be made, by inference or presumption, based on evidence showing that one is acting for another under circumstances implying knowledge of these acts on the part of the supposed principal. See *Elmore*, 31 Ill. App. 3d at 647. Once a *prima facie* case of agency is established by the plaintiff, the defendant has the burden of producing evidence of nonagency. See *Elmore*, 31 Ill. App. 3d at 647. Significantly,

an agent's authority may be presumed from the alleged principal's silence when he has knowingly allowed another to act for him as his agent. See *Elmore*, 31 Ill. App. 3d at 647; accord *Strino*, 365 Ill. App. 3d at 902. Then, the agent's scope of authority may be determined by what someone "of reasonable prudence, ordinarily familiar with business practices, dealing with the agent, might rightfully believe him to have on the basis of the principal's conduct." *Elmore*, 31 Ill. App. 3d at 647; accord *Strino*, 365 Ill. App. 3d at 902.

¶ 22 The trial court here found Martyniv to be defendant's agent and that, because of this, plaintiffs' notice to Martyniv of the water infiltration problem in February 2006 and Martyniv's undertaking and affirmance of the repairs were attributable to defendant, as the principal. Based on the record before us, we find there was an abundant amount of evidence to support this conclusion. Sujith testified that Martyniv, who was always at the construction site, introduced himself as the general contractor on the project. Sujith never met defendant until this lawsuit. Any and all contact Sujith had with respect to the construction–from what finishes would be used to when the project would be completed to the punch list items that needed repair after the closing–was solely with Martyniv, who exchanged phone numbers with him, told Sujith to call him if he had questions, and answered all his inquiries when he did call. Sujith testified that this contact occurred both before and after the closing. It was because of this continuous contact that Sujith called Martyniv at the end of February 2006, within the one-year warranty period, to tell him about the water problem and ask him to come and look at it.

¶ 23 Martyniv's testimony further demonstrates that he was acting as defendant's agent. Just as Sujith testified, Martyniv averred that he was consistently at the construction site to oversee

the project. There, he met Sujith, who came to the site often, and Martyniv gave him his cell phone number in case he had any questions regarding the house. Martyniv admitted to discussing numerous aspects of the project with Sujith and to returning Sujith's phone calls; again, this occurred both before and after the closing. Martyniv testified that Sujith called him about the water problem on February 21, 2006, within the one-year warranty period, and evidence was produced showing the Martyniv immediately thereafter made a series of telephone calls within the next few days to defendant, the masonry subcontractor on the project, and back to Sujith. Also within those days, Martyniv went to plaintiffs' home several times, examined the water stains, and established a plan to remediate the problem which, he explained to Sujith, would require painting, sealing and tuckpointing the roof. Martyniv then accompanied painters and masonry workers to the house and supervised and assisted their work for the next several weeks, both inside and outside. Martyniv never told Sujith that he was there just as a favor to Sujith, nor did he ever state that he was not there as defendant's representative.

¶ 24 In addition, perhaps most significant in showing that Martyniv was acting as defendant's agent is defendant's own testimony. Defendant stated that he was the general contractor on this project and that Martyniv was the project manager. In discussing the difference between these, defendant described that there was none, other than that a general contractor has a license and does not have to be at the construction site often, while a project manager does not have a license and is to be at the site all the time. Interestingly, neither he nor Martyniv had licenses in any home building trade, and defendant made clear that Martyniv was always at the site, organizing construction and directing the subcontractors according to the plans and

specifications. Defendant admitted that he never met plaintiffs until the start of this lawsuit and never spoke to them about any aspect of the house. Instead, he left this to Martyniv, whom he knew had been speaking to Sujith throughout the duration of the project and even after the closing. Defendant further, and critically, admitted that Martyniv was constructing the house with all the authority that came along with his position as project manager; Martyniv worked for him and he relied on Martyniv's experience on the project.

¶ 25 The situation here clearly depicted Martyniv as defendant's agent. In virtually all respects, Martyniv acted on behalf of defendant. From the contract, it is undisputed that defendant knew about plaintiffs as the purchasers and plaintiffs knew about defendant as the builder-vendor. However, it was always, and exclusively, Martyniv who acted as the intermediary between the two. Defendant remained silent on every issue of the project, both before and after the closing, consistently allowing Martyniv to act for him when it came to any issue plaintiffs had. Ultimately, defendant placed Martyniv in a situation where he could reasonably be presumed to have authority to act for him. See *Elmore*, 31 Ill. App. 3d at 647-48 (where builder-vendor and wife sold newly constructed home to the plaintiffs, who then experienced water infiltration problems which builder-vendor attempted but failed to fix, agency relationship was established between builder-vendor and wife so that she could not escape liability with respect to repair costs resulting from his failed attempt).

¶ 26 Defendant's assertion that Martyniv's authority to act on his behalf in dealing with plaintiffs ended once the closing took place save for any remaining punch list items is an untenable attempt to narrow the scope of this clear agent-principal relationship in a wholly

ridiculous manner. Any reasonable person would rightfully believe, based on what had been occurring here and on the lengthy and intricate dealings between Sujith and Martyniv, that Martyniv was acting with defendant's authority when he attempted to fix the water infiltration problem. First, defendant's claim is extremely weak, as he testified that he was not even sure what items were part of the punch list. Admittedly, this list could very well have included water infiltration problems for which, pursuant to his own testimony, he would undoubtedly have been responsible. Next, the same, consistent course of conduct repeated itself here. That is, just as with any problem, issue or question plaintiffs had with respect to the house, both before and after the closing, Sujith called Martyniv to tell him about it and Martyniv responded and tried to resolve it. This was the same manner of notice and resolution that had occurred between the parties since they had become involved in the project, from setting the completion date to deciding what finishes would be used to concluding the punch list items. Sujith called Martyniv when the problem developed in February 2006, well within the one-year warranty period; Martyniv responded to Sujith's concerns and went to the house with a crew of the same workers who had built the home; Martyniv laid out a plan to fix the problem and supervised the work for the next few weeks; and, at the end of this, Martyniv assured plaintiffs that the problem was resolved. And, finally, defendant testified that the way Martyniv attempted to fix the problem was consistent with what he would have done, namely, examine it, develop a plan to fix it, and call in the masonry subcontractor to execute the plan. In fact, defendant specifically testified that, if any problems like water infiltration arose in the house after the closing, it would have been Martyniv's job, not his, to coordinate the repairs anyway.

¶ 27 From all this, it is clear to us that Martyniv was acting for defendant under circumstances implying defendant's knowledge of these acts. Defendant remained silent both before and after the closing, knowing that Martyniv was dealing with plaintiffs with respect to every aspect of the house's construction and completion–a scope so broad that any reasonably prudent person, such as plaintiffs here who had dealt with Martyniv on such a regular basis, could justifiably assume went beyond the punch list items that remained after closing to include the water infiltration problem they reported in February 2006. Accordingly, we do not find that the trial court's conclusion that Martyniv was defendant's agent, which in turn meant that the notice plaintiffs provided to Martyniv within the one-year warranty period was attributable to defendant, was against the manifest weight of the evidence.

¶ 28 Having so held, the remaining issue defendant raises on appeal concerns, as he terms it, waiver. He spends a good portion of his argument in this regard contending that the trial court's finding that he waived any notice requirement, to be given him by plaintiffs in writing and within the one-year warranty period, cannot stand, mainly because plaintiffs did not plead waiver in their original complaint. Defendant then goes on to discuss that plaintiffs not only did not plead waiver, but they also did not prove it. Defendant is correct that plaintiffs never asserted a waiver claim against him. However, the trial court already recognized the error of its waiver finding when it, pursuant to his posttrial motion, amended its original decision and issued a new order holding that defendant, by his actions, was estopped from requiring written notice.[2] Thus, contrary to defendant's argument, there is no longer any need to discuss waiver in

[2]While plaintiffs had not pled waiver in their complaint, they had pled estoppel.

relation to this cause.

¶ 29 After briefly discussing the difference between estoppel and waiver, defendant's only argument with respect to the former is that, contrary to the trial court's decision, "[t]here is no good reason to hold that [he] should be equitably estopped from relying" on the contract provisions requiring plaintiffs to provide him written notice. Again, we wholly disagree. Equitable estoppel "has been defined as the effect of a person's conduct 'whereby the person is barred from asserting rights that might otherwise have existed against the other party who, in good faith, relied upon such conduct and has been thereby led to change his or her position for the worse.' " *Hahn v. County of Kane*, 2013 IL App (2d) 120660, ¶ 12 (quoting *Geddes v. Mill Creek County Club, Inc.*, 196 Ill. 2d 302, 313 (2001)). This involves an element of "fraud," though not in the strict legal sense, and can arise " ' "from silence as well as words." ' " *Hahn*, 2013 IL App (2d) 120660, ¶ 12 (quoting *Geddes*, 196 Ill. 2d at 314 (quoting *Bondy v. Samuels*, 333 Ill. 535, 546 (1929)). Equitable estoppel is most usually invoked by our courts when " 'a person by his or her statements and conduct leads a party to do something that the party would not have done but for such statements and conduct.' " *Hahn*, 2013 IL App (2d) 120660, ¶ 12 (quoting *Geddes*, 196 Ill. 2d at 313).

¶ 30 What occurred in the instant cause is a prime example of a situation where equitable estoppel should be applied. As the evidence demonstrates, plaintiffs gave actual notice to Martyniv, defendant's agent, of the water infiltration problem well within the one-year warranty period. Martyniv, again as defendant's agent, voluntarily undertook the repairs without requiring any written notice. He then assured plaintiffs that the repairs resolved the problem,

the house was now watertight, and nothing else needed to be done. As Sujith testified, plaintiffs in good faith relied on both the repairs having been completed without written notice and on the assurance that the problem was fixed. As such, they did not pursue the problem further until it was discovered that mold was everywhere in the home. Even though defendant remained silent through all this, he effectively placed his agent, Martyniv, in a situation where he was (rightfully, as we found above) presumed to have authority to act for him. Indeed, defendant's testimony proves he would have done the same things Martyniv did here in fixing the problem, and that he would have even put Martyniv in charge of the repairs. Undeniably, plaintiffs would suffer significant prejudice if defendant were able to undertake the repairs via his agent Martyniv, let the one-year warranty period lapse, and then subsequently invoke the written notice requirement. Ultimately, therefore, we hold that the trial court's finding that defendant was estopped from relying on the written notice provisions of the contract as a defense was not against the manifest weight of the evidence. See, *e.g.*, *Elmore*, 31, Ill. App. 3d at 647 (where principal places agent in situation where he may be presumed to have authority to act for him, the principal is estopped as against a third person from denying the agent's apparent authority).

¶ 31 CONCLUSION

¶ 32 Accordingly, for all the foregoing reasons, we affirm the judgment of the trial court.

¶ 33 Affirmed.